Supreme Court, U.S.
FILED
04-641 NOV 5 - 2004
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

COUNTY OF DUPAGE, a body politic and corporate,

Petitioner,

v.

PALMETTO PROPERTIES, an Illinois Corporation; and GREGORY A. SCHIRMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has clearly established that land use regulations are appropriate measures to mitigate the adverse secondary effects of adult businesses, so long as they are narrowly tailored to serve a significant governmental interest and leave open reasonable alternatives for such businesses to locate.

It is also well-established that political subdivisions of a state, such as counties and municipalities, can only be liable under Section 1983 for their own policies, practices and procedures that cause a deprivation of federal rights.

In 1998, the State of Illinois enacted a law, which set minimum statewide restrictions on the location of adult entertainment facilities. DuPage County followed this law and incorporated its provisions in the County's Adult Business Use Ordinance. The Seventh Circuit never addressed the merits of Respondents' challenge to this law. However, the Seventh Circuit deemed the Respondents a "prevailing party" against the county merely because the district court entered an interlocutory order in favor of the strip club operator. The interlocutory order against the county never became final or enforceable and never addressed the merits of the validity of the state law that was being followed. The case against the county was dismissed on grounds of mootness.

Therefore, questions presented are:

1. Whether a county with shrinking territorial zoning jurisdiction can rely on a statewide location restriction for adult entertainment facilities, imposed under state law, to avoid a challenge that it has failed to leave open reasonable alternatives for such establishments to locate within its limited jurisdiction.

2. Whether a county can be liable for attorney fees under Section 1988 for merely following a state law that

creates minimum statewide land use restrictions on the location of adult entertainment facilities.

3. Whether the Seventh Circuit erred in its prevailing party analysis by speculating that Respondents would have been successful in their First Amendment challenge to a county ordinance, where no final or enforceable order was entered against the county and no order was ever entered relieving the Respondents of the same restrictions under state law.

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OPINIONS BELOW

The July 7, 2004, Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 375 F.3d 542 (7th Cir. 2004) and is reprinted at App. 1. The December 9, 2002, Order of the United States District Court for the Northern District of Illinois, granting attorney fees is reprinted at App. 36. The January 3, 2002, Order of the District Court, dismissing the case on grounds of mootness is reprinted at App. 40. The April 26, 2001, Order of the District Court, clarifying its March 29, 2001, Memorandum and Opinion Order is reprinted at App. 32. The March 29, 2001, Memorandum and Opinion Order of the District Court, granting partial summary judgment, is reported at 160 F.Supp.2d 876 (N.D.Ill. 2001) and is reprinted at App. 19.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on July 7, 2004. On August 9, 2004, the Seventh Circuit entered an order denying the petition for rehearing. This petition for certiorari is timely in that Petitioner has filed it within 90 days of August 9, 2004. The Court has jurisdiction pursuant to U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This case involves the interpretation and application of the First and Fourteenth Amendments, a determination of the identity of the proper defendant under 42 U.S.C. § 1983 where the policy being challenged was the creation of a state legislature and the interpretation of the term "prevailing party" under 42 U.S.C. § 1988. Additionally, this case involves the interpretation of a state law and a

county ordinance that restrict the location of adult entertainment establishments.

UNITED STATES CONSTITUTION:

The 1st Amendment to the Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The 14th Amendment to the Constitution provides:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE:

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

ILLINOIS COMPILED STATUTES:

42 U.S.C. § 1988 provides:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

55 ILCS 5/5-1097.5 provides:

> Adult entertainment facility. It is prohibited within a county to locate an adult entertainment facility within 1,000 feet of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public housing, and place of religious worship.
>
> For the purposes of this Section, "adult entertainment facility" means (i) a striptease club or pornographic movie theatre whose business is the commercial sale, dissemination, or distribution of sexually explicit material, shows, or other exhibitions or (ii) an adult bookstore or adult video store whose primary business is the commercial sale, dissemination, or distribution of sexually explicit material, shows, or other exhibitions.

65 ILCS 5/11-5-1.5 provides:

> Adult entertainment facility. It is prohibited within a municipality to locate an adult entertainment facility within 1,000 feet of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public housing, and place of religious worship.
>
> For the purposes of this Section, "adult entertainment facility" means (i) a striptease club or pornographic

movie theatre whose business is the commercial sale, dissemination, or distribution of sexually explicit material, shows, or other exhibitions or (ii) an adult bookstore or adult video store whose primary business is the commercial sale, dissemination, or distribution of sexually explicit material, shows, or other exhibitions.

DUPAGE COUNTY ORDINANCES:

DuPage County Zoning Ordinance Sec. 37-3.2 (1998) provides:

> Definitions.
>
> Within the context of this Ordinance, the following words and terms shall have the meaning set forth, except where otherwise specifically indicated . . . .
>
> Adult Business Use: The use of property for the operation of . . . any use of which a significant or substantial portion involves an activity distinguished or characterized by its emphasis on matters depicting, describing or relating to Specified Sexual Activities or Specified Anatomical Areas. . . .
>
> Specified Anatomical Areas:
>
> a. Less than completely or opaquely covered human genitals, pubic region, buttock, anus or female breast below a point immediately above the top of the areola . . . .

DuPage County Zoning Ordinance Sec. 37-4.16-2 (1998) provides:

> Restrictions on the Location of Adult Business Uses.
>
> No adult business use, either as a permitted use or as a conditional use, shall be maintained: . . . (4) within

> 1,000 feet of any of a place of religious worship, day care center, cemetery, public housing, school, library, park, forest preserve, or other publicly operated recreational facility. . . .

STATEMENT OF THE CASE

I. Overview of the Case

Respondents brought this action alleging violations of the First and Fourteenth Amendments and seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and attorney fees under § 1988. Respondents' claims that are pertinent to this petition challenged the constitutionality of a state statute that imposed a restriction that prohibited the Plaintiffs from locating their proposed adult entertainment facility within 1000 feet of a forest preserve and a county ordinance that incorporated the provisions of the state statute. Respondents brought this action against the Petitioner-County, the forest preserve district, the county State's Attorney in his official capacity and the Illinois Attorney General in his official capacity.

II. Background of the Case

The 1000-foot locational restriction that exists under the State Adult Entertainment Facility statute was first incorporated into that statute as an amendment in 1998. The Respondents alleged in their Complaint, and the Petitioners agree, that the County amended its Adult Business Use Ordinance to provide the same 1000 foot locational restriction for such adult business uses solely as a result of the amendment to the state statute earlier in 1998. The county's exclusive reliance on state law in this matter is undisputed.

Petitioner-County is primarily an urban area in the Chicago metropolitan area. The county's population density has substantially increased during the last two decades. In 1986, the Petitioner enacted its adult business use ordinance under the guidance of this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). At that time, approximately 4.7 percent of the non-forest preserve land in the unincorporated area of the County was legally available to adult business uses. However, as a result of subsequent annexation by municipalities, the Petitioner-County's territorial zoning jurisdiction has been substantially reduced. The undisputed evidence in this case shows that by the year 2010, the only land that will be left in unincorporated DuPage County will be forest preserve land and single-family residential lots served by well and septic.

Under Illinois law, counties only have zoning authority in the unincorporated area. 55 ILCS 5/5-12007. Therefore, this shift of jurisdictional boundaries that causes land used for commerce and industry to be incorporated into municipalities has a significant adverse impact on DuPage County's ability to locate adult businesses in a manner that would not adversely affect the remaining land uses in the county. However, these jurisdictional changes increase the ability of municipalities to accommodate adult businesses within their increasing jurisdictional boundaries with less adverse impact on other land uses. Respondents' property is contiguous to the City of West Chicago, and it is undisputed that there are nearby sites within the corporate boundaries of West Chicago where the Respondents could legally locate their business.

III. Proceedings Below

On March 29, 2001, the District Court filed a Memorandum Opinion and Order granting in part and denying in

part Petitioner's motion for summary judgment and granting in part and denying in part Respondents' motion for summary judgment. App. 19. All claims directed at the State's Adult Entertainment Facility statute were dismissed. Under this interlocutory order, Respondents were granted only partial summary judgment on claims involving the County's Adult Business Use Ordinance.

On April 26, 2001, the District Court entered an order clarifying the previously entered order that granted partial summary judgment to the Respondents. App. 32. This order clarified that only that portion of the County Ordinance prohibiting adult businesses from locating within 1000 feet of a forest preserve was declared unconstitutional. On January 3, 2002, the District Court granted the County Defendants' motion to dismiss on grounds of mootness, and terminated all other pending motions on grounds of mootness. App. 40. Thereafter, on December 9, 2002, the District Court awarded attorney fees to the Respondents. App. 36.

The Seventh Circuit affirmed the fee award essentially on the grounds that Respondents would have obtained an enforceable judgment had the case not become moot. App. 18.

REASONS FOR GRANTING THE PETITION

I. Statewide Land Use Regulations

This Court and several lower courts have recognized that regional land use regulations may be a defense to a challenge from an adult business operator that the restriction does not allow adequate alternative locations within the territorial jurisdiction of one of the municipalities. However, there is no clear decision from this Court on this issue. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1337 (11th Cir. 2000) (Taking into consideration the unique fact that unincorporated Broward County is shrinking, the Eleventh Circuit held that Broward County's zoning ordinance did not deprive the appellant adult bookstores of reasonable avenues of communication.); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981) (The Sixth Circuit recognized that "the First Amendment burden would be rendered incidental if, for example, county-wide zoning were present to ensure that there were reasonable access to the protected activity in nearby areas."); and *Township of Saddle Brook v. A.B. Family Center*, 156 N.J. 587, 722 A.2d 530 (1999) (Recognizing that "[s]ome federal courts have either implied or held that the constitutionality of countywide zoning ordinances restricting protected speech should be evaluated on a regional basis, and not determined by whether the use is permitted in the municipality where the applicant seeks to locate.")

In *Shad*, this Court stated:

> The Borough nevertheless contends that live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough. Its position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas

> of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits.

Shad, 452 U.S. at 76.

As a result of urban sprawl, it is becoming more difficult for counties that are losing territorial zoning jurisdiction to continue to provide reasonable alternative locations for adult-oriented businesses to locate without causing harm to the remaining land uses. However, the remaining pockets of unincorporated areas within counties can be protected by regional or statewide land use regulations without offending the First Amendment rights of adult business operators since reasonable alternatives can be made available on a regional basis.

A regional or statewide approach to regulating the location of adult entertainment facilities also provides reasonable protection to small towns and villages that otherwise lack appropriate locations for adult businesses because of their limited territorial zoning jurisdiction. Recognition of the validity of statewide restrictions on the location of adult entertainment facilities will preserve the fundamental federalism principles that limit the federal government's authority to interfere with the state's ability to structure its laws in ways that otherwise meet constitutional standards.

Under our system of federalism, there is no sound basis to invalidate a state law on First Amendment grounds merely because some of the state's political subdivisions have lost jurisdiction through the annexation of their territory by adjoining municipalities.

II. Liability of Political Subdivisions That Merely Follow Valid State Laws

The dominance of state law over local governmental entities has been one of the most complicated factors that limit congressional and federal judicial authority to impose sanctions on local governmental entities. It is a dimension of constitutional law that can appear confusing and can be easily overlooked. As this Court recognized in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 669-83 (1978), one of the greatest points of contention when Congress adopted the Civil Rights Act of 1871 was over a proposal that would have created municipal liability. As this Court recognized, Congress chose to reject the proposal (the Sherman Amendment) that would have created municipal liability because it lacked authority to alter duties imposed under state law. *Id.* at 693.

In *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 415 (1997), this Court stated, "As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns . . . ."

At least one Circuit has considered whether local officials can be liable for fees for failing to successfully defend a state law that it acted under. *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990). However, this Court has yet to address this issue. In *Echols*, the Plaintiffs were arrested for participating in a peaceful boycott and picketing of a local business. *Id.* at 797. They brought a successful lawsuit challenging the constitutionality of the statute that authorized their arrest. In deciding who was responsible for attorney fees, the Fifth Circuit determined that the

county officials were acting as state agents when they enforced a state statute and could not be held responsible for attorney fees resulting from their enforcement of an unconstitutional state policy. The Fifth Circuit reasoned that:

> [T]he State cannot dissociate itself from actions taken under its laws by labeling those it commands to act as local officials. A county official pursues his duties as a state agent when he is enforcing state law or policy.

Id. at 801.

The Seventh Circuit should not have imposed fees on the Petitioner-County for merely following state law. The only reason the county incorporated the forest preserve provision into its adult business ordinance was "solely" because it was state law. App. 5. The Plaintiffs pled this fact in their complaint and they stipulated to this fact in the proceeding below. It is undisputed that the County was acting pursuant to a state law and statewide policy when it incorporated the forest preserve buffer provision into its Ordinance. The Illinois General Assembly made 55 ILCS 5/5-1097.5 part of the "Counties Code." See, 55 ILCS 5/1-1001, et seq. More particularly, this provision is found in Article 5 of the Counties Code, which sets forth the "Powers and Duties of County Boards." 55 ILCS 5/5-1001, et seq.

The Seventh Circuit's Opinion recognized that with respect to the forest preserve restriction, the Respondent-County's restriction mirrored the state's. App. 4. The forest preserve restriction is the only policy the District Court found in violation of the First Amendment. App. 34-35. It was clearly the intent of the state legislature to create minimum statewide location restrictions for adult entertainment facilities. At the same time the state enacted 55 ILCS 5/5-1097.5, 65 ILCS 5/11-5-1.5 was also enacted with identical restrictions on the location of strip clubs within

the corporate boundaries of municipalities. A county should not be deemed the culpable party when it is merely following state law.

III. Necessity of an Enforceable Judgment or Court Sanctioned Consent Decree

The Seventh Circuit's opinion contradicts this Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001), in that Respondent failed to obtain an enforceable judgment on the merits or a court-ordered consent decree.

This Court's decision in *Buckhannon* substantially changed the understanding of the term "prevailing party," as that phrase is used in § 1988. Prior to *Buckhannon*, recovery was based on the catalyst theory, whereby fees were awarded if litigation was a catalyst for change of the defendant's conduct. *Buckhannon* rejected the catalyst theory for recovery of attorney fees under § 1988, and held that in order to recover fees under § 1988 a plaintiff had to show more than a defendant's voluntary change in conduct. In order to give effect to the statutory language of the term "prevailing party," the court determined that a Plaintiff had to show that there was a "judicial imprimatur on the change," involving "a corresponding alteration in the legal relationship of the parties." *Id.*, 532 U.S. at 605. Although several Circuits had applied the catalyst theory for recovery of attorney fees, this Court recognized in *Buckhannon* that it had "only awarded attorney fees where the plaintiff has received a judgment on the merits."

The Seventh Circuit has attempted to distinguish *Buckhannon* on the grounds that Respondents "could have requested that the district court close the case and then sued to enforce the judgment." App. 18. Petitioner should

have been able to rely on the fact that this case was dismissed on grounds of mootness. The Petitioner did not amend its ordinance until after the District Court made it clear that it had not reached a decision on the merits with regard to the validity of the state law that the Respondent relied on. Obviously, there was no need for the parties to continue to litigate the constitutionality of Petitioner's ordinance when it appeared that the same provisions remained in full force and effect under state law. If Respondents wanted to be considered prevailing parties, they should have objected to the mootness determination.

The law of mootness is not affected by a party's interest in attorney fees under § 1988. As stated by this Court, "This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *see also, New York Taxi Drivers v. Westchester County Taxi and Limousine Com'n*, 272 F.3d 154, 159 (2d Cir. 2001). In *Buckhannon*, this Court stated, "If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees." *Buckhannon*, at 609. However, in the case before this court, there was no case or controversy between these parties after the County amended its ordinance. There was no final judgment entered in favor of the Plaintiffs and there is no judicially sanctioned consent decree. Once Plaintiffs' claims were moot there was nothing to litigate. Petitioner could not appeal the interlocutory summary judgment that became moot. How can Respondents be deemed prevailing parties for a result that has no legal effect?

State law still prohibits Respondents from locating a strip club within 1000 feet of a forest preserve. They obtained no real relief in this litigation. The most danger-

ous consequence of the Seventh Circuit's opinion is that it implies that the locational restrictions imposed under state law are invalid, even though there has never been any decision on the merits of this claim. This Court's precedent clearly shows that it is improper to award attorney fees on claims that are moot.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. There is a need for this Court to set clear precedent that statewide land use regulations are an appropriate means to regulate the location of adult entertainment facilities. Imposing attorney fees upon a county for merely following state law raises serious federalism concerns. Lastly, the Seventh Circuit's opinion creates an erroneous exception to this Court's decision in *Buckhannon*. This Court should reverse the Seventh Circuit for these reasons and to provide uniform guidance to the lower courts.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-2174

PALMETTO PROPERTIES, INC. and GREGORY A. SCHIRMER,

Plaintiffs-Appellees,

v.

COUNTY OF DUPAGE and JOSEPH E. BIRKETT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 2980—**David H. Coar**, *Judge.*

ARGUED DECEMBER 12, 2003—DECIDED JULY 7, 2004

Before COFFEY, RIPPLE and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* This case raises a question about an award of attorney's fees to a "prevailing party" under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000). After the underlying claims, which challenged the constitutionality of both state and local adult-entertainment zoning regulations, were disposed of through dismissals, partial summary judgments, a repeal of the relevant portion of the local statute, and a final dismissal for mootness, the district court granted the plaintiffs' motion for attorney's fees. For the following reasons, we affirm.

I. Background

The issue on appeal can be succinctly stated: did the district court correctly award attorney's fees to Palmetto as a "prevailing party" under 42 U.S.C. § 1988? However, "prevailing party" is a legal term of art, generally meaning a "party in whose favor a judgment is rendered . . . ." *Buckhannon Bd. & Care Home, Inc. v. W. Vir. Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001) (quotation omitted). In *Buckhannon*, the Supreme Court demonstrated that, although the issue and definition can be pithily put, in order to determine whether an award of attorney's fees would be appropriate, a meticulous analysis of the "particular judgments and orders entered in a case" is necessary. *McGrath v. Toys "'R" Us, Inc.*, 356 F.3d 246, 253 (2d Cir. 2004). We have done so in the past, *see, e.g.*, *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003) ("*Federation*"), and to do so here, we now review the underlying facts and procedural posture of this case.

Palmetto Properties, Inc. and George Schirmer (collectively, "Palmetto") sought to open an adult entertainment nightclub or cabaret in DuPage County, Illinois. According to County Ordinance section 37-3.2, Palmetto's strip club is classified as an "adult business use" because the employee-dancers expose "specified anatomical areas" and/or engage in "specified sexual activities." DuPage County Ordinance § 37-3.2 (1986).[1] Likewise, the club is an "adult

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[1] In relevant part, section 37-3.2 states:
Adult business use. The use of property . . . of which a significant or substantial portion involves an activity distinguished or characterized by its emphasis on matters depicting, describing or relating to Specified Sexual Activities or Specified Anatomical Areas . . . .

(continued...)

entertainment facility" under state law 55 Ill. Comp. Stat. 5/5-1097.5 (1998).[2]

While both the state and county regulate the location of these adult businesses, after the state adopted its first such zoning law in 1998, the two regulations differed in material respects. First, under the law as adopted in 1986, DuPage County required all adult businesses to locate in

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[1] (...continued)

* * *

Specified Anatomical Areas:

a. Less than completely or opaquely covered human genitals, pubic region, buttock, anus or female breast below a point immediately above the top of the areola; and

b. Human male genitals in a discernibly turgid state, even if completely or opaquely covered.

Specified Sexual Activities:

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse, fellatio or sodomy;

c. Fondling, kissing or other erotic touching of Specified Anatomical Areas;

d. Flagellation or torture in the context of a sexual relationship;

e. Masochism, erotic or sexually oriented torture, beating or the infliction of pain;

f. Erotic touching, fondling or other such contact with an animal by a human being;

g. Human excretion, urination, menstruation or vaginal or anal irrigation as part of or in connection with any of the activities set forth in "a" through "f" above.

[2] In relevant part, section 5/5-1097.5 states: "For the purposes of this Section, 'adult entertainment facility' means (i) a striptease club or pornographic movie theatre whose business is the commercial sale, dissemination, or distribution of sexually explicit material, shows, or other exhibitions or (ii) adult bookstore or adult video store . . . ."

a zoning district designated "industrial" and banned such establishments from locating within 1000 feet of other adult businesses, or within *500* feet of certain residentially zoned districts or any "church, school, library, park or other publicly operated recreational facility." DuPage County Zoning Ord. § 37-4.16-2 (1986). But the law adopted by the state in 1998 banned all adult businesses from locating "within *1,000* feet of the property boundaries of any school, *day care center*, *cemetery*, public park, *forest preserve*, *public housing*, and place of religious worship." 55 Ill. Comp. Stat. 5/5-1097.5 (1998) (emphasis added). Consequently, in December of 1998, after the state adopted its regulation, the County amended its ordinance to (1) add various categories of land use from which adult business must be separated; and (2) increase the required separation distance from 500 to 1000 feet. DuPage County Zoning Ord. § 37-4.16-2 (1998).[3] The County's zoning restriction thereby mirrored the state's.

Second, the County's 1986 ordinance stated that its purpose was to "eliminate [the] adverse effects" of adult businesses, such as the "blighting or downgrading" of sur-

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[3] Ordinance section 37-4.16-2, as amended in 1998, stated:

> No adult business use, either as a permitted use or as a conditional use, shall be maintained: (1) within 1,000 feet of the property line of another adult business use; (2) within 1,000 feet of any of the following zoning districts as provided for under this Ordinance: R-1, R-2, R-3, R-4, R-5, R-6, and R-7; (3) within 1,000 feet of a zoned residential district lying within a municipality; or (4) within 1,000 feet of a place of religious worship, day care center, cemetery, public housing, school, library, park, forest preserve or other publicly operated recreational facility. The distances provided for in this section shall be measured by following a straight line without regard to intervening structures, from a point on the property or the land use district boundary line from which the proposed use is to be separated.

rounding neighborhoods. DuPage County Zoning Ord. § 37-4.16-1 (1986). In adopting that law, the County relied upon a study conducted by the City of Indianapolis, which had adopted a similar 500-foot separation requirement, and upon a customer-origin survey done by DuPage and Cook Counties. The state statute, however, contained no such statement of policy, nor did its legislative history reveal any studies or reports relied upon by the Illinois General Assembly. And when the County amended its ordinance in 1998 "solely to incorporate [the state law]," no new studies were conducted, nor earlier studies reevaluated, and the statement of policy went unchanged.

The land Palmetto obtained (and partially developed) for the proposed adult business complied with all of the locational limits set out in the County and State regulations, save one. The parcel was 735 feet (i.e, more than 500, but less than 1000 feet) from the boundary of Pratt's Wayne Woods Forest Preserve, much of which is not accessible to the public.[4] As a result, Palmetto feared that the County and/or State would prevent the nightclub's opening based upon the 1000-foot forest preservation separation requirement. Palmetto sued DuPage County, the Forest Preserve District of DuPage County, Joseph E. Birkett (in his official capacity as DuPage County State's Attorney), and Jim E. Ryan (in his official capacity as Illinois Attorney General), arguing that the state and local laws were violations of the First and Fourteenth Amendments. Specifically, in its third amended complaint, Palmetto alleged

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[4] We note that in its first complaint, filed on May 5, 1999, Palmetto apparently did not realize that the relevant parcel was within 1000 feet of a forest preserve and asserted that the parcel complied with all the state and local zoning limitations. Thus, Palmetto argued only that the ordinances were unconstitutional on their face. Eventually, Palmetto realized its mistake and amended its complaint—twice.

that: (1) the 1000-foot forest preserve separation requirement, under either law, was facially unconstitutional because it was unsupported by a substantial governmental interest; (2) the forest preserve separation requirement, under either law, was unconstitutional as applied to Palmetto; and (3) both laws were facially unconstitutional in toto because they effected a complete ban of protected speech in DuPage County.[5]

Between February of 2000 and March of 2001, the district court was inundated with a flurry of motions to dismiss, summary-judgment motions, responsive pleadings, and competing fact statements, resulting in a total of at least thirty-four filings. Early in the course of the proceedings, however, Illinois Attorney General Ryan was dismissed from the suit because Palmetto failed to overcome the presumption of Ryan's Eleventh Amendment immunity. This determination was not appealed.

Finally, on March 29, 2001, the district court issued its order, which sorted through myriad summary-judgment

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[5] An additional constitutional challenge was also raised. Palmetto's property was zoned as a "Light Industrial District," designated I-1. However, adult business uses may locate as of right only in "Heavy Industrial Districts," designated I-2. Hence, Palmetto, in order to open the proposed club, needed a special or conditional zoning use permit from the County. *See* DuPage County Zoning Ord. §§ 37.14.13 *et seq.* (1998) (laying out the application procedure). But such permits may be granted only if the applicant complies with all zoning restrictions, other than the designation. *See id.* As a result, Palmetto could not obtain a permit because less than 1000 feet separated the relevant parcel from the forest preserve. Palmetto, therefore, also challenged the ordinances regarding special or conditional use permits as unconstitutional prior restraints of protected speech. Because the district court never reached the merits of this issue, *see infra* note 7, it is largely tangential to the instant appeal.

issues. First, the Forest Preserve District's motion for summary judgment was granted "because the District has no connection to the enforcement of the DuPage Ordinance or the Illinois Statute and there is no District ordinance or policy at issue here." Second, the court found that because Palmetto's claims were "rooted in the First Amendment," Palmetto was entitled to "rely on the impact of the ordinance[s] on the expressive activities of others as well as [its] own," and hence, the case was ripe for adjudication. Third, State's Attorney Birkett's Eleventh Amendment immunity barred Palmetto's suit with respect to the state law, but not with respect to the County Ordinance.[6] Therefore, only the County of DuPage and Birkett (only with respect to the County ordinance) remained as defendants (hereinafter collectively "Defendants" or "County").

Reaching the merits, the district court held that: (1) the state and local zoning forest preserve separation requirements were neither supported by a significant government interest nor narrowly tailored because neither entity presented any evidence or prior case law to demonstrate that strip clubs negatively impact areas of forest preserves not open to the public; and (2) both restrictions failed to leave open reasonable alternative means of communication. Uncertain as to whether the district court struck down the entirety of the County Ordinance or simply the forest preserve segment, Defendants asked the district court to clar-

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[6] Because the district court applied Eleventh Amendment immunity to protect both Attorney General Ryan and State's Attorney Birkett from the claims challenging the state law, *see, e.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974), it appears that no challenge to the state ordinance remained. Indeed, although the district court's March 29, 2001 order discussed the merits of both the state and local statutes, in its subsequent clarifying order, the district court specifically addressed only the County ordinance.

ify its judgment. The court did so on April 26, 2001 and specifically declared only the portion of Ordinance section 37-4.16.2 referring to "forest preserves" unconstitutional.[7]

Presumably wanting to avoid further litigation, the Defendants informed the district court and Palmetto that, instead of appealing, the offending provision of the ordinance would be amended or repealed. Hence, while the County pursued such action, the district court continued the case in lieu of entering a final order to officially close the action. As promised, the forest preserve separation requirement was repealed.[8] Palmetto was therefore free to operate its proposed nightclub. Following its opening, the district court dismissed the lawsuit as moot on January 3, 2002.

Palmetto then petitioned for an award of attorney's fees from the Defendants as a "prevailing party" under 42 U.S.C. § 1988. While there was no dispute as to the amount claimed, the Defendants adamantly argued that Palmetto was not a prevailing party. The district court disagreed. After carefully analyzing *Buckhannon* and noting that Palmetto did not request fees related to claims never addressed on the merits, *see supra* notes 5 and 7, the district court awarded $49,175.00 to Palmetto. This appeal resulted and, for the following reasons, we affirm the district court's award.

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[7] Having found the forest preserve restriction unconstitutional, the court also determined that it need not reach the prior restraint claim. *See supra* note 5.

[8] The County actually adopted new restrictions, which differentiated between "active" and "passive" recreational areas, which include forest preserves. But the amended ordinance requires only a 500-foot separation between an adult business and "passive recreational areas." (R. 100.) Hence, the statute no longer posed any bar to Palmetto's strip club.

II. Analysis

A. Standard of Review

Under 42 U.S.C. § 1988 a "prevailing party" is entitled to "a reasonable attorney's fee." When analyzing a district court's grant or denial of such fees, we review de novo the lower court's purely legal conclusions. *Federation*, 326 F.3d at 932. But factual matters underlying the fee award, such as the fee amount and a party's ultimate litigation goals, are reviewed for clear error. *Cady v. City of Chicago*, 43 F.3d 326, 329 (7th Cir. 1994). Because the County challenges only whether the district court inappropriately extended the definition of a "prevailing party," our review here is de novo.

B. *Buckhannon* and Its Progeny

In *Buckhannon*, the Supreme Court interpreted "prevailing party" under the fee-shifting provision of the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3613(c)(2). Because nearly all federal fee-shifting provisions use this term of art, *see, e.g.*, 42 U.S.C. §§ 1988, 12205, the *Buckhannon* Court encouraged consistent interpretation, when possible, across the federal statutes. *See* 532 U.S. at 602-03. Although we have not gone so far as to hold that *Buckhannon* applies to all fee-shifting statutes, we have held that it is conclusively presumed to so apply absent a clearly contrary indication in the "text, structure, or legislative history of a particular fee-shifting statute . . . ." *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 475 (7th Cir. 2003) (internal quotations omitted) ("*T.D.*"). Therefore, we followed the strictures of *Buckhannon* in the two cases recently brought before this court which required interpretation of "prevailing party." *T.D.*, *supra*; *Federation*, *supra*. In *Federation*, we expressly held that it is "abundantly clear" that *Buckhannon* applies

to the term as used in 42 U.S.C. § 1988. *Federation*, 326 F.3d at 932 n.8. In short, whether Palmetto is entitled to attorney's fees under 42 U.S.C. § 1988 depends upon the application of *Buckhannon*, *T.D.*, and *Federation*.

The Supreme Court in *Buckhannon* upheld a denial of attorney's fees where a defendant "voluntarily" mooted the action. *Buckhannon*, 532 U.S. at 610. A corporation operating assisted-living residences sued the state of West Virginia (and other individual and agency state actors), claiming that a particular provision of a state statute violated the FHAA. *Id.* at 600-01. The state legislature repealed the contested provision, thereby mooting the suit, while discovery was still pending and prior to any substantive judicial determinations. *Id.* at 601. Specifically rejecting the "catalyst theory,[9]" the Court emphasized that a defendant's voluntary change in conduct, "although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605 (emphasis in original). The Court also discounted arguments about defendants' incentives to avoid fees, noting that such considerations were too speculative and thus unhelpful because, depending on the case, a defendant's fear of fees may or may not be as significant as its fear of monetary damages, if liable. *Id.* at 608. Finally, the Court stated that if the catalyst theory applied, major, yet wholly tangential, litigation would likely result because a district court would need to delve into a "highly factbound" analysis of a defendant's subjec-

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[9] Under the catalyst theory, a plaintiff was entitled to attorney's fees as a "prevailing party" so long as (1) the claim was at least colorable, and not groundless; (2) the lawsuit was a substantial rather than insubstantial cause of the defendant's change in conduct; and (3) the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than the threat of expense. 532 U.S. at 610.

tive motivations in changing its conduct. *Id.* at 609. Thus, the Court held that in order to be a "prevailing party," a litigant must have obtained a judgment on the merits, a consent decree, or some other judicially sanctioned change in the legal relationship of the parties. 532 U.S. at 604-05 (citing *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam); *Maher v. Gagne*, 448 U.S. 122 (1980); *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792 (1989)).

In *T.D.*, the parents of a student suffering from attention deficit disorder claimed that the defendant school district deprived the student of a "free appropriate public education" under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400(d)(1)(A), and appealed to the district court an administrative adjudication which proposed to place the student in a regular classroom, instead of authorizing placement at a private day school. 349 F.3d at 471-73. Specifically, we considered whether the plaintiff was entitled to attorney's fees where cross-motions for summary judgment had been filed, but when the parties negotiated a settlement agreement before any rulings by the district court. In the agreement, the defendant acquiesced to nearly all the plaintiff's demands—placement of the student in a special program in a public school, and reimbursement to the parents for tuition and all costs relating to the student's prior attendance at the day school. 349 F.3d at 473-74. Importantly, the settlement agreement contained no provision regarding attorney's fees. *Id.* at 473. After concluding that *Buckhannon* applies to IDEA, *id.* at 478, we found that while most "private settlement agreements do not entail the judicial approval and oversight involved in consent decrees," some do, in which case a settlement agreement can be the basis for an award of attorney's fees. *Id.* at 478-79 (internal quotation omitted). But in *T.D.*, despite the fact that the district court was actively involved in the settlement negotiations, the agree-

ment (1) was not embodied in a court order or judgment; (2) did not bear the judge's signature; and (3) did not give the district court continuing jurisdiction to enforce the agreement. *Id.* at 479. *See also Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2001) (holding that a court-sponsored settlement conference was insufficient to make the plaintiff a prevailing party). Hence, we concluded that it was "merely a private settlement agreement between the parties," lacking the judicial imprimatur necessary to convey "prevailing party" status. *Id.*

In *Federation*, an advertising trade association sued the City of Chicago, alleging that an ordinance prohibiting the placement of alcohol and cigarette advertisements on billboards, sides of buildings, and freestanding signboards violated the First Amendment and was preempted by federal and state statutes. 326 F.3d at 927. In 1988, the trade association moved for summary judgment on both the First Amendment and preemption claims. Although no ruling was made on the First Amendment claims, the district court held that all portions of the ordinance relating to cigarette advertising were preempted by federal law and that the portions relating to alcohol were not severable. *Id.* The City appealed the preemption determination, and we reversed in large part, finding that (1) only a tiny provision of the ordinance was preempted by federal law; and (2) the ordinance was severable. *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 639-40 (7th Cir. 1999).

Subsequently, the City amended the ordinance to remove the preempted portion and other provisions, the constitutionality of which had been seriously called into question by *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999). 326 F.3d at 928.

The trade association then amended its complaint to drop the preemption claim and to entirely eliminate its

challenge to the cigarette-advertising portions of the ordinance. *Id.* In 2001, the association again moved for summary judgment on its remaining First Amendment claims. But before the City filed its response, the Supreme Court decided *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which held that a statute similar to the challenged ordinance was preempted by federal law. *Id.* The City then filed a cross-motion to dismiss based upon mootness, indicating that although the City believed its statute was materially different from the *Lorillard* ordinance, the risks of going forward in light of *Lorillard* had persuaded it to repeal the ordinance. *Id.* The City did indeed repeal the ordinance, and the district court then dismissed the case and denied the trade association's request for attorney's fees under 42 U.S.C. § 1988. *Id.*

Upon appeal of the district court's denial of fees, we analyzed exactly what, if any, "judicially sanctioned change" in the legal relationship of the parties the trade association had achieved. First, we pointed out that while the district court originally granted its motion for summary judgment on preemption grounds, we reversed the "core holding" of that decision. Simply because "we affirmed [a tiny] portion of the original district court decision certainly does not make [the trade association] a prevailing party," particularly when our holding provided the association no relief at all. 326 F.3d at 933.

Second, we assumed, *arguendo*, that the City's repeal of the statute was "not voluntary," instead compelled by the combination of the Supreme Court's decision in *Lorillard* and the association's motion for summary judgment. However, because neither the City nor the trade association were parties to that case, we concluded that there was "[no] judgment that changed the legal relationship between the parties in *this* case," *id.* (emphasis in original), and we affirmed the district court's denial of attorney's fees.

C. Attorney's Fees for Palmetto

The facts of this case are essentially undisputed. The district court granted Palmetto a partial summary judgment, striking down as unconstitutional the portion of the County adult-entertainment zoning ordinance pertaining to forest preserves—the only provision which effectively prevented Palmetto from operating its nightclub. The County, after presumably concluding that its odds of success on appeal were limited, assured the district court and Palmetto that it would repeal the offending provision. Thus, the district court continued the case to give the County a sufficient amount of time to correct its error. As promised, the ordinance was repealed and the case was dismissed as moot.

The County now contends that Palmetto is not entitled to an award of attorney's fees because "the partial summary judgment pertaining to the forest preserve provisions in the County Ordinance never became final or enforceable before the case was dismissed for mootness." We disagree. It would defy reason and contradict the definition of "prevailing party" under *Buckhannon* and our subsequent precedent to hold that simply because the district court abstained from entering a final order formally closing the case—a result of the Defendant's assertions that it would repeal the challenged portion of the ordinance—Palmetto somehow did not obtain a "judicially sanctioned change" in the parties' legal relationship.

In *Buckhannon*, the challenged state law was repealed, thereby mooting the case, *before* the district court made *any* substantive rulings. Thus, the *Buckhannon* Court construed the change in the defendants' conduct as *voluntary*, lacking the necessary judicial imprimatur. In this case, not only did the district court make a substantive determination as to essentially all the constitutional claims save one, *see supra* notes 5 and 7, the County repealed the ordinance

only *after* that determination had been made and presumably *because of it*. To be sure, the Defendants were free to moot the case *before* the summary-judgment ruling, in which case the action would have been voluntary. They did not. Hence, their action is most persuasively construed as involuntary—indeed exhibiting judicial imprimatur.

Furthermore, while the *Buckhannon* Court dismissed concerns about "mischievous defendants" (i.e., those who moot a case to avoid an award of attorney's fees), the qualifications placed upon those remarks apply in this case:

> [P]etitioners' fear of mischievous defendants only materializes in *claims for equitable relief*, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: "It is well settled that *a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice*" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Buckhannon, 532 U.S. 608-09 (emphasis added) (footnote omitted). Here, Palmetto sought only equitable relief; monetary damages were an impossibility because neither the state nor the County had taken any action to halt or otherwise actionably delay the development of Palmetto's proposed club. Also, and as noted above, the County's "voluntary cessation" of the "challenged practice" (i.e., the forest preserve provision) was done *after* the district court determined its illegality. Indeed, had Palmetto so desired, Palmetto (or the County for that matter) could have pressed the district court to enter a final order closing the case immediately following the court's summary-judgment

ruling. Instead, Palmetto graciously—and in reliance upon Defendants' assurances—waited for the Defendants to amend the regulation and moot the case. In short, reversing the district court's award of attorney's fees in this case would contradict *Buckhannon's* logic, create an inequitable result, and promote inefficiency because plaintiffs who have succeeded on the merits would be encouraged to rush forward with potentially unnecessary litigation, solely to preserve their entitlement to fees.

Nor does our reasoning in *T.D.* mediate in favor of reversing the district court's award of attorney's fees in the instant case. In *T.D.*, the parties entered into a wholly private settlement agreement, whereby the defendant school district agreed to most of the plaintiff's demands. Here, there was no settlement agreement. Instead, Palmetto secured a favorable substantive ruling from the district court, which, in turn, prompted the Defendants to repeal the zoning restriction.

In addition, this case can be distinguished in two ways from the unique situation presented in *Federation*. First, while the *Federation* plaintiffs did initially obtain a favorable judgment on the merits of their preemption claims, on appeal, the lion's share of the district court's ruling was reversed. And the tiny portion of the summary judgment upheld on appeal failed to give the plaintiffs any meaningful relief. We reasoned that a substantially overruled summary judgment, failing to provide relief, could not confer upon the plaintiffs "prevailing party" status.

Second, the city defendants in *Federation* repealed the ordinances at issue because they perceived that a *different* case—namely, the Supreme Court's *Lorillard* decision—cast serious doubt upon their constitutionality. We assumed, arguendo, that the repeal of the challenged statute was therefore involuntary, but nonetheless concluded that an award of attorney's fees was inappropriate. We rea-

soned that no judgment changed the legal relationship of the parties to the *Federation* lawsuit; a party in one lawsuit cannot claim to be a "prevailing party" based upon the successes of a party in a different lawsuit. But in this case, Palmetto *itself* obtained a judgment on the merits, which provided the relief sought in the action, and the County chose not to take any steps to pursue an appeal.

Moreover, in *Federation*, we implied that a plaintiff who obtains a favorable summary-judgment ruling, unchallenged by an appeal, would qualify for an award of attorney's fees under *Buckhannon* and 42 U.S.C. § 1988:

> Nor does the fact that [the plaintiff] had a summary judgment motion pending provide the necessary judicially sanctioned change. Even assuming that after *Lorillard*, the district court would have granted [the plaintiff's] motion had the [defendant] City not repealed its ordinance, the fact remains that no such ruling was made and thus no judicial relief was awarded to Federation.

326 F.3d at 933. Our *Federation* decision, which assessed the procedural posture of that case, supports the district court's grant of attorney's fees in the instant case.

We lastly note that the County's argument is unavailing not only because it contradicts *Buckhannon*, *T.D.*, and *Federation*, but also because it values form over substance. Nowhere does the County posit that the district court's summary-judgment rulings wouldn't have been appealable had the district court simply entered a final order formally closing the case. And the only reason the court did not do so was because the County requested a continuance so that it could moot the case. The summary-judgment orders changed the legal relationship of the parties because, for example, had Palmetto grown impatient with the time it took the County to repeal the offending zoning provision, Palmetto could have requested that the district court close

the case and then sued to enforce the judgment. Nor does the County argue that the district court, in making its summary-judgment determination, failed to evaluate the evidence presented by both parties or failed to apply the appropriate constitutional law to the facts of the case. It would fly in the face of legal intuit to conclude that the district court's partial grant of a summary judgment would not constitute a "judgment on the merits" adequate to confer "prevailing party" status upon Palmetto, simply because—at the County's behest—the district court delayed in entering a final order to close the case.

III. Conclusion

In sum, the district court's $49,175.00 award of attorney's fees to Palmetto was equitable, efficiency-promoting, a logical development in *Buckhannon* jurisprudence, and applied a common-sense understanding of a "judgment on the merits." For the foregoing reasons, we AFFIRM the award of attorney's fees under 42 U.S.C. § 1988.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 2980 Date March 29, 2001

Name of Assigned Judge: DAVID H. COAR

Case Title: PALMETTO PROPERTIES, Inc., et al. v. COUNTY OF DuPAGE

* * * * *

DOCKET ENTRY:

* * * * *

(10) ■ [Other docket entry] For the reasons stated in the attached memorandum opinion and order, the Court GRANTS the Forest Preserve District's motion for summary judgment [#62]; GRANTS IN PART and DENIES IN PART Birkett's motion and the County's motion [#64] and GRANTS IN PART and DENIES IN PART the plaintiffs' motion for summary judgment [#61].

(11) ■ [For further detail see the order attached to the original minute order form.]

* * * * *

Palmetto Properties et al. ,	)	
Plaintiffs,	)	
	)	No. 99 C 2980
v.	)	
	)	
County of DuPage, et al.,	)	Judge **David H. Coar**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Palmetto Properties and its owner Gregory Schirmer want to operate a nightclub featuring nude or partially nude female dancers. The defendants are the DuPage County State's Attorney, the County of DuPage ("the County Defendants"), and the Forest Preserve District of DuPage County ("the District")[1]. The plaintiffs sued the defendants for declaratory judgment and an injunction. According to the plaintiffs' theory, an Illinois statute and a DuPage County ordinance, both of which prohibit operation of strip clubs within 1000 feet of a forest preserve, violate the First Amendment to the Constitution as applied to the states through the Fourteenth Amendment's Due Process Clause. The parties have cross-moved for summary judgment. For the reasons stated below, the Court: (1) GRANTS IN PART and DENIES IN PART the County Defendants' motion; (2) GRANTS IN PART and DENIES IN PART the plaintiffs' motion; and (3) GRANTS the District's motion[2].

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[1] This Court has previously dismissed the Illinois Attorney General, who the plaintiffs sued in his official capacity.

[2] The Court GRANTS the motion for summary judgment by the Forest Preserve District of DuPage County because the District has no connection to the enforcement of the DuPage Ordinance

(continued...)

Introduction

The plaintiffs own property located in the unincorporated portion of DuPage County. They intend to operate a nightclub featuring nude or semi-nude women doing strip tease dancing. The plaintiffs' property is approximately 735 feet from Pratt Wayne Woods Forest Preserve. The only area of Pratt that is within a 1000-foot radius of the plaintiffs' property is an area known as Fern Marsh South. DuPage characterizes it as a "nature conservancy area." This area, along with about 90 percent of the entirety of Pratt, is undeveloped and not used by, or accessible to the general public. Fern Marsh does not contain any trail systems and has no developed public access in the direction of the plaintiffs' property. Fern Marsh is typical of most of the forest preserve land, as policy requires that only about 10 percent of Pratt be developed for active use. The rest of Pratt is used almost exclusively for preserving forests and other natural wilderness areas.

Both the state of Illinois and DuPage County have laws that prohibit strip clubs from operating within 1000 feet of a forest preserve. See 55 ILCS 5/5-1097.5; DuPage Zoning Ordinance §37-3.2. In 1998, when the Illinois legislature added the provision requiring the 1000-foot separation for forest preserves, it did not rely upon studies or reports concerning the impact of strip clubs on these areas. And,

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[2] (...continued)
or the Illinois Statute and there is no District ordinance or policy at issue here. The plaintiffs argue that the District has not proved that it can't enforce the laws. They say that it, like any other citizen, could sue to enjoin a strip club as a public nuisance affecting its property. Maybe so, but by this logic any private citizen would be acting "under color of law" and could be joined as a party in a suit challenging the DuPage ordinance and the Illinois law.

although the County relied upon studies when it passed its original zoning ordinance, it amended the ordinance without conducting or considering any further studies. Specifically, the County did not consider any studies of the impact of strip clubs on Forest Preserves generally or areas like Fern Marsh specifically. With the current zoning scheme in place, there are no lots in unincorporated DuPage County on which a strip club could operate.

Although the plaintiffs have stated their intention to operate a strip club on their property, they have not yet done so. Also, the DuPage County State's Attorney's Office has not threatened to prosecute the plaintiffs under either law if they did open a strip club. Wary of opening a business that might be close down under either the Illinois statute or the DuPage County ordinance, the plaintiffs have asked this Court to declare both laws unconstitutional.

Analysis

As an initial matter, the defendants argue that this case is not yet ripe because there is no way to tell whether the plaintiffs' strip club will engage in expressive conduct that is protected by the First Amendment. The defendants' argument misses the mark. It is now almost beyond doubt that "strip tease" dancing of the kind that the plaintiffs' propose to exhibit is expressive conduct deserving of First Amendment protection. See, e.g., Miller v. South Bend, 904 F.2d 1081, 1085; id. At 1089-1104 (Posner, C.J. concurring); see also City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 1391 (2000) (plurality opinion); id. At 1402 (Souter, J. concurring in part and dissenting in part); id. At 1406 (Stevens and Ginsberg JJ., dissenting). Even if there was a question as to whether the plaintiffs' strip club would exhibit expressive conduct, "[b]ecause their claims are rooted in the First Amendment, they are entitled to

rely on the impact of the ordinance on the expressive activities of others as well as their own." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981). The plaintiffs' suit, therefore will not be dismissed on this ground.

Eleventh Amendment Immunity

The defendants next contend that the Eleventh Amendment bars the plaintiffs' suit. The Eleventh Amendment says that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. In broader terms, principles of sovereign immunity and limited federal judicial power prohibit a citizens from suing not just foreign states but also their own states in federal court. Hans v. Louisiana, 134 U.S. 1, 10 (1890)[3]. Broadly speaking then, the doctrine bars most suits for damages and for equitable relief against any state in federal court. E.g., Sherman v. Community Consolidated Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). Although the state itself is not named as a party, suits against state agents in their official capacity are deemed actions against the state. See Kentucky v. Graham, 473 U.S. 159 (1985). Also, local

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[3] The Eleventh Amendment inapplicable by its terms because this case involves Illinois citizens suing the State of Illinois. Nevertheless the Court will employ the convenient "Eleventh Amendment" label that the parties and many other courts have employed. See Crosetto v. State Bar of Wisconsin, 12 F3d 1396, 1400 n.5 (7th Cir. 1993) ("some courts have used 'the Eleventh Amendment' as a shorthand substitute for the Hans doctrine's authority and origin. While convenient, this characterization is imprecise.").

officials are considered state agents when they are charged with enforcement of state statutes. See Garcia v. City of Chicago, 24 F.3d 966 (7th Cir. 1994).

There are, however, exceptions to Eleventh Amendment immunity. See, e.g., Ex Parte Young, 209 U.S. 123, 155 (1908). Under Young, suits for declaratory and injunctive relief against state agents "clothed with some duty in regard to the enforcement of the laws of the state" who are prosecuting or have threatened to prosecute individuals under the allegedly unconstitutional statute may be subject to suit for prospective relief. Id. Unquestionably, the plaintiffs have sued these defendants for prospective relief. Also, Birkett is an officer of the state "clothed with some duty in regard to the enforcement of the laws of the state." Id.; see 55 ILCS 5/3-90005(a)(1). But, no prosecution has been threatened or is pending. Although the plaintiffs argue that it is enough that Birkett is charged with enforcement, they have appointed to no case - in the context of the First Amendment or otherwise - where this has been held sufficient under Young.

There have been cases where the Governor or the Attorney General of Illinois have been found to lack sufficient connection to a statute in question for Young to apply. And, in some of these cases the Court has pointed to the county state's attorney's authority to prosecute individuals under Illinois statutes as evidence that the connection is not sufficient. See, e.g., Sherman, 980 F.2d at 441. But, while authority to prosecute is a necessary condition to invoke the Young exception, it is not sufficient. Since the plaintiffs have not been threatened with prosecution under the law, this aspect of the defendants' motion is GRANTED and the plaintiffs' motion with respect to the Illinois statute is DENIED.

While the Eleventh Amendment immunity disposes of the plaintiffs' claim with respect to the Illinois statute, the

Eleventh Amendment does not apply to Birkett's enforcement of the DuPage County ordinance. He is not an officer of the state with respect to local law. The Court, therefore, turns to the challenge to the DuPage ordinance under the First Amendment.

First Amendment Challenge

To evaluate the ordinance, it is first necessary to determine the appropriate level of scrutiny to be applied. The character of the ordinance determines the proper test. This ordinance is a content-based restriction of speech since is only applies to strip tease clubs and not to other types of entertainment or dance clubs. See, DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828 (7th Cir. 1999). Ordinarily, this Court subjects content-based classifications to strict scrutiny. E.g. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878 (2000). The Supreme Court, however, has devised an adult-entertainment doctrine for evaluating zoning ordinances like the one at issue here. See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 49 (1986). In these cases, when the zoning laws appear to be concerned with the "secondary effects" associated with adult entertainment facilities, they are treated as if they are content-neutral time-place-or-manner restrictions. Id. At 49 (1986); DiMa, 185 F.3d at 828 (Renton held that "regulation of sexual explicit material would be treated like content-neutral time, place, and manner regulations, not that [such zoning ordinances were] content-neutral").

Under the Renton test, the ordinance will only survive a First Amendment challenge if: (1) there is significant government interest; (2) the ordinance is narrowly tailored to serve the interest; (3) and it leaves open ample alternative avenues of expression. See Renton, 475 U.S. at 50. The government bears the burden of justifying the restriction

by pointing to evidence in support of these elements at least by the time that the parties move for summary judgment in a suit challenging the law. DiMa, 185 F.3d at 829-30. The government bears the burden of identifying the "secondary effects with some particularity" Id., 185 F.3d at 829.

Government Interest

The stated purpose of the ordinance is to combat the "blighting or downgrading of the...neighborhood" surrounding adult business uses. With its 1000 feet separation requirement at issue here, the neighborhoods that DuPage County has chosen to protect are forest preserves. The Supreme Court has stated that a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Young v. American Mini Theaters, 427 U.S. at 71. Courts have upheld separation requirements for public parks in a number of cases. See, e.g., Renton, 475 U.S. at 50-51. To a certain degree, forest preserves are similar to public parks. But, they are not public parks. The most notable difference being that forest preserves are not completely open and accessible to the general public. The plaintiffs dispute that the government has any interest in protecting plants (90% of forest preserves) from the adverse effects of strip clubs.

The analogy to public parks only gets the defendants about 10 percent of the way. Although courts defer somewhat to government's asserted interests, two things counsel against such deference in this case. First, even assuming that those portions of a forest preserve that are open to the public are analogous to a public park, 90 percent of the forest preserve largely inaccessible to the general public. It is not apparent that the secondary effects recognized by courts on residential and commercial areas have any relevance to any inaccessible forest.

Second the defendants have not supported their analogy by any evidence or studies showing the similarities between even the 10 percent of forest preserves open to public use, let alone the 90 percent that is not. Based on the plaintiff's concession, the Court finds that the defendants' have a significant interest, but only in protecting the forest preserve areas that are open to the public. The defendants have failed to show a significant interest in protecting from the secondary effects of strip clubs, the vast portions of forest preserve land that are sheltered from human use. The Court now turns to the second and third aspects of the Renton test with the government's interest defined.

Narrow Tailoring

To defend an ordinance on summary judgment from a constitution challenge, the government "must offer some record support for the ... Ordinance's amelioration [of the purported secondary effects]." DiMa, 185 F.3d at 829. New studies of adverse affects of strip clubs are not necessary "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Renton, at 51-2. The second aspect of the time-place-or-manner test requires that the classification serve the identified problem well (i.e., be "narrowly tailored"). Although the Supreme Court usually requires a close fit when assessing whether a statutory scheme is "narrowly tailored," in the specific context of the adult entertainment doctrine, the test is not so rigorous.

Despite the oft-repeated phrase "narrowly tailored"- the Renton test does not require an extremely tight fit between the classification and the ends. For example, the Supreme Court in Renton concluded that the zoning ordinance there was not fatally underinclusive even though it did not regulate other adult businesses (e.g., adult movie theaters)

or non-adult businesses (e.g., bars) that cause "secondary effects." Renton at 51. The Court concluded that the ordinance was narrowly tailored because it affected "only the category of theaters shown to produce the unwanted secondary effects." Id. The fact that the town of Renton studied adult movie theaters but did not study strip clubs or other entertainment facilities did not alter the narrow tailoring analysis. Id. At 52. Also, this Court is aware of no case in which a plaintiff has been permitted to show that an ordinance is overinclusive because that plaintiff's business dos not cause the secondary effects at which the zoning ordinance is directed.

Notwithstanding the more relaxed fit requirement, the defendants have failed to show that the ordinance adequately serves its interests with respect to forest preserves. First, they have failed to produce any evidence or studies of their own, or evidence upon which they relied or could rely from other jurisdiction to support their ordinance. They have not produced evidence either with respect to the parts of forest preserves open to the public or with respect to the vast majority of area within forest preserves that see virtually no human traffic. Although the defendants recognize that at least by the time of summary judgment they must come forward with evidence justifying the restriction on the plaintiffs' protected expression, see DiMa, 185 F.3d at 829, they have offered only the conjecture of their attorneys. Their reply is that many other jurisdictions have enacted similar separation requirements and courts have upheld those requirements. By this logic, however, the ubiquitousness of similar ordinances would also suggest the ubiquitousness of studies supporting these separation requirements. The defendants, however have not produced a single study or any other evidence. The defendants have failed in this respect to justify the

ordinance under Renton[4].

Even if this Court assumed that the separation requirement served an interest in protecting the parts of the preserve that are open to the public, the ordinance is still extraordinarily and thus fatally overbroad. The undisputed evidence shows that 90 percent of the forest preserve is not open to the general public - like public parks are - and see virtually no human traffic whatsoever. Even under the less rigorous narrow-tailoring standard customarily applied in these types of cases, the ordinance must fail. The "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock Against Racism, 781, 799 (1989) (footnote omitted). Because the ordinance is significantly overbroad, the Court finds that is it unconstitutional.

Other Avenues of Expression

In addition to and as a result of being overbroad, the ordinance also fails to satisfy the third part of the Renton test because it fails to leave open ample alternative avenues of expression. See Renton, 475 U.S. at 50. Although "the constitution does not mandate that any minimum percentage of land be made available for certain types of speech," North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 445 (7th Cir. 1996)), a total ban is inappropriate. An ordinance that regulates expressive

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[4] The defendants also argue that their ordinance was enacted merely to be consistent with Illinois law and that they relied on the Illinois statute. While it is permissible to rely on other jurisdictions, simply stating that such reliance happened does not relieve the government of the burden of showing what exactly it was upon which they relied. They haven't done that here.

activity like the DuPage ordinance does, must leave a "reasonable opportunity" for speech within the zoning scheme. See Renton, 475 U.S. at 52. These alternate avenues of expression must be within the jurisdiction that controls the zoning. It is not sufficient to say that neighboring communities permit the type of speech that the challenged ordinance bans. See Schad, 452 U.S. at 77-77 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (quoting Schnieder v. State, 308 U.S. 147, 163 (1939))).

The parties concede that there is no land within unincorporated DuPage County that permits the adult use that the plaintiffs seek to operate. To avoid the consequences of this fact, the defendants argue that areas of both incorporated and unincorporated DuPage County should be examined. The defendants' zoning authority, however, applies only in the unincorporated areas of the county. 55 ILCS 5/5-12001. And as already noted, the government may not simply point to neighboring communities that permit the speech as a defense to their ordinance that bans that type of speech from its jurisdiction. See Schad, 452 U.S. at 77-77. Consequently, the ordinance also fails the First Amendment challenge in this respect.

Prior Restraint

The plaintiffs have also argued that the zoning scheme in DuPage County is an unconstitutional prior restraint on speech. In light of the Court's determination that the ordinance is unconstitutional with respect to the separation requirement related to forest preserves, it need not reach the issue of prior restraint.

Conclusion

For the reasons stated above, this Court: GRANTS the Forest Preserve District's motion for summary judgment; GRANTS Birkett's motion and DENIES the plaintiffs' for summary judgment with respect to the Illinois statutes; DENIES the motion of Birkett and the County of DuPage and GRANTS the plaintiffs' motion with respect to the DuPage County ordinance. The Court declares the DuPage Ordinance unconstitutional and enjoins the defendants from enforcing that ordinance.

Enter:

/s/David H. Coar
United States District Judge

Dated: March 29, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 2980 Date April 26, 2001

Name of Assigned Judge: DAVID H. COAR

Case Title: PALMETTO PROPERTIES, Inc., et al. v. COUNTY OF DuPAGE

* * * * *

DOCKET ENTRY:

* * * * *

(10) ■ [Other docket entry] For the reasons stated on the reverse side of this order, the Court GRANTS the County's motion [#96], clarifies its previous order [#94], and declares unconstitutional only the portion of subsection (4) of Section 37-4.16.2 that refers to a "forest preserve.". Status Hearing set for May 17, 2001 at 9:30 a.m.

(11) ■ [For further detail see * * * x order attached to the original minute order form.]

* * * * *

Palmetto Properties et al. ,	)	
	)	
	)	No. 99 C 2980
v.	)	
	)	
County of DuPage, et al.,	)	Judge **David H. Coar**
	)	

ORDER

On March 29, 2001, this Court declared unconstitutional a DuPage County zoning ordinance that regulates the location of strip clubs in relation to, among other things, forest preserves. The County of DuPage moved this Court to clarify the Court's order. Specifically, the County asks this Court sever the forest-preserve provision of Section 37-4.16.2. For following reasons, the Court GRANTS the County's motion and declares unconstitutional only the portion of subsection (40 Of that Section that refers to a "forest preserve."

The DuPage County zoning ordinance contains a severability provision. That section provides that if a court "adjudges any part of this Ordinance or any amendment thereto, to be invalid, such judgment shall not affect any other provisions of this Ordinance, or amendment thereto, not specifically included in said judgment." See Section 37-4.2-1. If a legislature would have enacted the constitutional aspects of a law without the unconstitutional provisions, then the offending provisions should be severed. See Zbaraz v. Hartigan, 763 F.2d 1532, 1544 (7th Cir. 1985) (citations omitted). By contrast, severance is improper if the unconstitutional provision is an "integral part of the statutory enactment viewed in its entirety." Id.

The severance provision here and the structure of Section 37-4.16.2 suggests that the County would have enacted it with or without the provision related to forest preserves. The Court will therefore sever the reference to forest preserves. See Makula v. Village of Schiller Park, No. 95 C 2400, 1998 U.S. Dist. Lexis 7173 at *32-3 (N.D. Ill. April 24, 1998).

In opposition to the County's motion, the Plaintiffs argue that this Court's pronouncement swept more broadly and invalidated Section 37-4.16.2 in its entirety. The Plaintiffs are mistaken. The fact that the Court invalidated the forest-preserve provision under both the second and third prongs of the test set for the in Renton v. Playtime Theaters, Inc., 475 U.S. 41, 49 (1986), does not mean that the entire section is invalid. Both this Court's narrow-tailoring and other-avenues-of-speech analysis focused on the separation requirement of strip clubs from forest preserves. The parties did not present any other aspect of the zoning ordinance in the cross-motions for summary judgment.[1]

Finally, the fact that this Court did not reach the Plaintiffs' prior restraint claim also does not support their contention that the prior ruling invalidated all of Section 37-4.16.2. Plaintiffs claimed on summary judgment that the forest preserve restriction was the only impediment to location their strip club on the subject property. As presented to this Court, in the absence the forest preserve separation requirement, the ordinance would not have prevented the Plaintiffs' operation of a strip club. Based on

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[1] The Plaintiffs state that their complaint addressed issues broader than the forest preserve provision, but the issues addressed on summary judgment were confined to that separation requirement.

this presentation and the result that this Court reached - invalidating the forest-preserve provision - there was no reason to address the prior restraint claim.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 2980 Date December 9, 2002

Name of Assigned Judge: DAVID H. COAR

Case Title: PALMETTO PROPERTIES, Inc., et al. v. COUNTY OF DuPAGE

* * * * *

DOCKET ENTRY:

* * * * *

(10) ■ [Other docket entry] For the reasons stated on the reverse side of this minute order, this Court awards attorney's fees and costs to the Plaintiffs, as the prevailing parties with respect to the zoning ordinance separation requirement, in the amount of $49,175.00 [107-1], pursuant to the fee-shifting provision of 42 U.S.C. §1988.

(11) ■ [For further detail see * * * x order attached to the original minute order form.]

* * * * *

Palmetto Properties et al.,	)	
	)	
	)	No. 99 C 2980
v.	)	
	)	
County of DuPage, et al.,	)	Judge **David H. Coar**
	)	

ORDER

Plaintiffs brought this action challenging the land use restrictions found in a DuPage County Zoning ordinance and an Illinois statute that would prohibit Plaintiffs from establishing their adult entertainment facility, which would feature nude and partially nude dancing, from locating within 1000 feet of a forest preserve. On March 29, 2001, this Court ruled in favor of Plaintiffs on their Motion for Summary Judgment as to the locational restriction found in the County's adult business use zoning ordinance. The Court clarified its March 29th order on April 26, 2001, stating that its prior order "declares unconstitutional only the portion" of the county ordinance that refers to a "forest preserve." The DuPage County zoning ordinance contained a severability provision, and this Court therefore severed the reference to forest preserves. The Court did not reach issues in Plaintiffs' Complaint other than the forest preserve issue because the issues addressed on summary judgment were confined to that separation requirement. After the Court's clarifying order, the parties informed the court that the County was going to reconsider the provisions in its zoning ordinance and that such action by the County would moot the case. This case was continued, and on January 3, 2002, the Court granted the County's 12(b)(1) motion to dismiss on grounds of mootness because the County passed amendments to the County zoning ordinance that mooted all Plaintiffs' claims directed at the County.

The parties submitted a Local Rule 54.3(e) Joint Statement concerning Plaintiffs' petition for attorney fees. Plaintiffs contend they are entitled to $49,175.00 in attorney fees, which they calculated under the "lodestar" method, as the prevailing parties with respect to the zoning ordinance separation requirement. Defendants contend that no fees should be awarded because Plaintiffs are not prevailing parties under 42 U.S.C. §1988, but they otherwise do not dispute the hours or the rate claimed. Defendants argue that, because Plaintiffs did not receive a final order in their favor, and because the County amended the challenged ordinance before Plaintiffs opened their business and before a final order was entered in this case, they are not prevailing parties under Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health and Human Resources, 532 U.S. 598 (2001). This Court disagrees.

In Buckhannon, the plaintiffs brought an action seeking declarative and injunctive relief from a West Virginia statute that was alleged to violate the Fair Housing Amendments Act (FHAA) and the American with Disabilities Act of 1990 (ADA). The West Virginia legislature enacted two bills that eliminated the challenged provisions, which prompted the Court to dismiss case against the State on mootness grounds. Id. At 601. The plaintiffs requested attorney fees as the prevailing party under the "catalyst theory," which posits that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought voluntary change in the defendant's conduct. Id. The Supreme Court rejected the plaintiffs' position, holding that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. §613(c)(2), and the ADA, 42 U.S.C. §12205. Id. At 600. The court stated that the term "prevailing party" as used in many federal fee-shifting statutes, including §1988, does not "include[] a party that has

failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Id. Rather, the Court noted that "the view that a 'prevailing party' is one who has been awarded some relief by the court," and that "a material alteration of the legal relationship of the parties" is necessary to permit an attorney's fees award. Id. At 604-05.

Unlike the plaintiffs in Buckhannon, however, the plaintiffs here were awarded some relief by this Court; namely, the Court reached the merits when Plaintiffs were granted partial summary judgment and the Court declared unconstitutional the portion of the county ordinance that referred to a forest preserve. Thus, as to that provision, the County did not voluntarily change its conduct when it amended the ordinance. Indeed, the Court effectively severed the unconstitutional provision from the zoning ordinance, restraining the enforcement of that requirement against Plaintiffs, which was a "material alteration of the legal relationship of the parties." As to the Plaintiffs' other claims, such as their prior restraint or statutory challenges, the County did in fact voluntarily amend its ordinance, and the Plaintiffs do not seek attorney fees for work performed on those claims. This Court therefore finds that Plaintiffs have successfully demonstrated that they are the prevailing parties with respect to the zoning ordinance separation requirement. As Defendants do not dispute Plaintiffs' calculation of fees, pursuant to the fee-shifting provision of 42 U.S.C. §1988, Plaintiffs are awarded attorney fees in the amount of $49,175.00.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 99 C 2980 Date January 3, 2002

Name of Assigned Judge: DAVID H. COAR

Case Title: PALMETTO PROPERTIES, Inc., et al. v. COUNTY OF DuPAGE

* * * * *

DOCKET ENTRY:

* * * * *

(5) ■ Status hearing held.

(10) ■ [Other docket entry] Defendants' Rule 12(b)(1) Motion to Dismiss Plaintiff's Third Amended Complaint on the basis of Mootness is Granted as stated on the record. This action is dismissed on Mootness grounds. Any other pending motions are moot and terminated. This action is closed.

* * * * *

(2)

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

No. 04-641

IN THE

Supreme Court of the United States

COUNTY OF DUPAGE, a body politic and corporate,

Petitioner

v.

PALMETTO PROPERTIES, INC., an Illinois corporation and GREGORY A. SCHIRMER

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly awarded Palmetto attorneys' fees as a "prevailing party" where a) the court entered partial summary judgment invalidating an adult business use separation requirement, b) the County subsequently amended that requirement so that it did not apply to Palmetto, c) Palmetto then opened its adult entertainment cabaret at its chosen location, and d) the trial court thereafter dismissed the case as moot?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the Respondents state that Palmetto Properties, Inc. does not have a parent corporation and that no publicly held company holds 10 % or more of its stock. Gregory A. Schirmer is a natural person.

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STATEMENT OF THE CASE

In light of this Court's Rules 15.3 and 24.2, the Respondents, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"), will forego a comprehensive statement of the case. The Court of Appeals' decision below undertook a "meticulous analysis" of the proceedings, Ptn. App. 2, and its "Background" discussion fairly completely describes the litigation in the trial court, Ptn. App. 2-8. The Statement of the case by the Petitioner County of DuPage ("County"), Ptn. 5-7, however, requires amplification or correction in three respects.[1]

First, Palmetto's constitutional challenges included a prior restraint attack, *cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 238 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 322 n. 2 (2002), on the County's procedures (and the substantive standards governing them) for processing a request for special or conditional zoning use approval, which was specifically required of prospective "adult business uses," such as Palmetto, which sought to locate in light – as opposed to heavy – industrial districts. Ptn. App. 6 n.5. The trial court denied the County's motion to dismiss that challenge, but it later failed to reach that challenge in its partial summary judgment of March 29, 2001. Ptn. App. 8 n. 7, 30. That failure – apparently based upon a misapprehension that the prior approval requirement would not apply once the

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[1] The County's recitation of Relevant Provisions Involved, Ptn. 1-5, also requires amplification in one technical respect. This Court has generally understood the Fourteenth Amendment's Due Process Clause, not the Privileges and Immunities Clause, as the vehicle of incorporation against state and local governments of protections such as that of the First Amendment's Free Speech Clause. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Fiske v. Kansas*, 274 U.S. 380, 387 (1927). The Due Process Clause reads ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

challenged separation requirement had been invalidated, *see* Ptn. App. 34-35 – was the primary reason why the partial summary judgment did not itself become a final judgment. After the partial summary judgment, the County repealed the requirement that prospective adult business uses obtain prior special or conditional zoning use approval, so that issue, too, was rendered moot. The presence of the prior restraint challenge explains why the March 29, 2001 order did not amount to a final judgment. Beyond that, though, the prior restraint challenge is "largely tangential" here, as the Court of Appeals properly recognized. Ptn. App. 6 n. 5.

Second, and more important, it is at best a serious understatement to assert, as the County repeatedly does, Ptn. 5, 11, 14, that the County's zoning ordinance, as amended in 1998, merely "incorporated" the provisions of the Illinois statute promulgated earlier that year. The County concedes that its own zoning ordinance expressly forbade adult business uses from locating within 1000 feet of any portion of a forest preserve. Ptn. 4-5. The Court of Appeals correctly characterized the ordinance as "mirror[ing]" the state statute, Ptn. App. 4, as indeed the County occasionally does as well, Ptn. at 11.

Finally, the County fails to make it clear that the trial court refused to reach the merits of Palmetto's challenge to the state statute (which, as the Court of Appeals recognized, Ptn. App. 6, was identical in all respects to the challenge to the invalidated ordinance provision) only because no Defendant sought to enforce or defend the statute below. Ptn. App. 24. Indeed neither the Attorney General, the State's Attorney, the Forest Preserve District, nor, for that matter, anyone else *ever* attempted to enforce the state statute against Palmetto. In fact, Palmetto located, opened, and has long operated its adult entertainment cabaret at its chosen location without limitation under the

statute. Since the statute regulates only the initial location, not the continuing operation, of an "adult entertainment facility," Ptn. 3, the doctrine of latches, as well as that of judicial estoppel, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), now precludes its assertion against Palmetto.

REASONS FOR DENYING THE PETITION

I. The Award of Attorneys' Fees Is Proper Under *Buckhannon* Because the Trial Court's Partial Summary Judgment Altered the Legal Relationship Between the Parties and Placed a Judicial *Imprimatur* upon the Ordinance Amendment Which Was Necessary to Moot the Case Below.

Until the trial court granted Palmetto partial summary judgment on March 29, 2001, the County took the position that its zoning ordinance *alone* prohibited Palmetto from ever opening its adult entertainment cabaret at its chosen location. *See* Ptn. App. 26. The trial court's partial summary judgment established that the County's position was wrong. Ptn. App. 29-30, 33-35. Rather than appeal that decision, the County decided to moot the case by amending the challenged ordinance provisions so they no longer applied to Palmetto at all. Ptn. App. 8, 14. As the County was in the process of doing so, Palmetto completed the construction of its building, and it promptly opened its adult entertainment cabaret at its chosen location. It has been operating that cabaret ever since. After Palmetto thus located and opened its adult entertainment cabaret, the trial court formally dismissed the case as moot. Ptn. App. 8.

Under these circumstances, the trial court subsequently determined that Palmetto was a prevailing party, within

the meaning of Section 1988, on its challenge to the ordinance's requirement that adult business uses separate by at least 1000 feet from all portions of a forest preserve. It thus awarded to Palmetto its reasonable attorneys' fees, *see* 42 U.S.C. § 1988, carefully limited to compensating for the time necessarily spent on challenging the ordinance separation requirement. Ptn. App. 8. Both courts below had no trouble recognizing two things. First, the relevant legal relationship between the parties changed at the time of the partial summary judgment, not when the county eventually got around to amending its already-invalid ordinance provision. Second, it was indeed the partial summary judgment – rather than Palmetto's challenge alone – which prompted the County to stop defending its position and change it instead. Ptn. App. 14-15, 39. In this case there was thus both a "judicially sanctioned change in the legal relationship of the parties" and "the necessary judicial *imprimatur* on the change" made to the challenged ordinance. This Court took care to note that both were absent in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001). The instant attorney's fees award was thus perfectly proper under *Buckhannon*. The County has altogether failed to suggest any disagreement at all among lower courts on this score. *Cf.* S. Ct. Rule 10(a).

The County does complain about two things. First, it suggests that an attorneys' fees award is always inappropriate whenever the final, formal result is a mootness dismissal. Not only would this raise pure form high over substance, it would create perverse and seriously inefficient litigation incentives, as the Court of Appeals quite properly recognized below. Ptn. App. 15-16. In this case, for instance, Palmetto could have pressed for prompt consideration of its prior restraint challenge. Instead, it "graciously," Ptn. App. 16, allowed the County time to

repeal the challenged provisions requiring specific prior approval for each prospective adult use in a light industrial zone, deliberately foregoing compensation for the attorneys' fees generated by the prior restraint challenge. Palmetto should not be further penalized for adopting this much more efficient litigation course. The decisions below leave government defendants free to avoid attorneys' fees awards by setting themselves up as constitutional moving targets, provided only that they make their moves *before*, rather than after, a court enters a substantive ruling against their initial position.

Second, the County suggests that, since the original impetus for its forest preserve separation requirement arose from an amendment to a state statute, the State of Illinois, rather than the County of DuPage, should answer for any attorneys' fees which may be due to Palmetto. The County never even begins to explain how its current suggestion is consistent with the litigation choices it adopted below. Neither the County nor anyone else sought to enforce or defend the state statute at all in the trial court. They altogether abandoned the statute before the trial court. In contrast, the County actively defended the separation requirement which *its ordinance* imposed between adult business uses and all portions of forest preserves. For this reason, this case simply does not present the question of which government entity should pay a fee award when, for instance, a County State's Attorney unsuccessfully defends a challenged state statute. *Cf.* Ptn. 10, *citing Echols v. Parker*, 909 F.2d 895 (5th Cir. 1990). At times, the County speaks as if state law somehow constrained it to affirmatively amend its zoning ordinance in 1998. But any such suggestion is flatly inconsistent with the County's own position that it was free to formally moot this litigation by *abandoning* the 1000-foot separation requirement which its ordinance imposed between adult business uses and all

portions of a forest preserve. The County simply cannot have it both ways.

Both the trial court and the unanimous Seventh Circuit panel were correct in concluding that Palmetto was a "prevailing party" under Section 1988. No court has suggested otherwise of any similarly situated plaintiff. *Cf.* S. Ct. Rule 10(a). There is no good reason to issue a writ of certiorari in this case.

II. The Merits of Palmetto's Challenges to the Adult Use Separation Requirements Are Not Before this Court Since No Party Sought to Enforce or Defend the State Statute Below and Since the County Amended its Ordinance Provision Rather than Appeal from the Trial Court's Decision Invalidating It.

This Court's Rule 15.2 expressly admonishes respondent's counsel "that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition" "that bears on what issues properly would be before the Court if certiorari were granted." It is primarily for this reason that Palmetto files the instant opposition. *Cf.* S. Ct. Rules 15.1, 15.4.

The County spends much of its discussion of its Reasons for Granting the Writ commenting on matters which were either not decided by the trial court or not timely appealed to the Court of Appeals. Ptn. 8-12, 13-14. These matters cannot properly be brought here on a writ of certiorari, even though the County is correct in asserting this Court's

jurisdiction to review the attorneys fees award itself under Section 1254(1) of Title 28 of the United States Code.[2]

In particular, the County argues at some length, Ptn. 8-9, as if a question concerning the validity of the Illinois statute regulating the location of adult entertainment facilities is properly before this Court. *E.g.* Ptn. 9 ("no sound basis to invalidate a state law on First Amendment grounds merely because . . .") It is not. No Defendant below sought to enforce or defend that statute in the trial court, and no one, in fact, ever attempted to assert that statute against Palmetto. For that reason, the trial court dismissed all challenges to the statute *without* reaching the merits. Ptn. App. 7 n. 6, 23-25. No party appealed from the trial court's disposition of Palmetto's challenge to the statute. It was thus never before the Court of Appeals, and it cannot come here on review by writ of certiorari.

In addition, the County argues as if the validity of its own ordinance provisions – or at least *some* countywide or broader adult use zoning provisions – were in question at this juncture. Again, they are not. In this case, the trial court struck down one provision of the County's zoning ordinance as amended in 1998. The County then further amended it to eliminate any case or controversy over it between Palmetto and anyone else. This case then, predictably enough, came to an end (on the merits) after Palmetto opened its adult entertainment cabaret at its chosen location. No doubt many interesting questions would have arisen if the Defendants below had bothered to enforce or defend the state statue below. *See, e.g., Township of Saddle Brook v. A.B. Family Center, Inc.*, 156 N.J.

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[2] Palmetto agrees that this Court has jurisdiction in this case to entertain the Question Presented *as stated* in this Opposition at i. For the reasons presented at 1-6, of course, Palmetto respectfully submits that it should not do so.

587, 596-97, 722 A.2d 530, 535 (1999)("relevant market area"). But because they did not – and *only* because they did not – no record was made below concerning these interesting issues. While this Court may some day need to resolve such issues, it should not attempt to do so now on a silent record. Indeed, it presently lacks the jurisdiction to do so.

CONCLUSION

For all of the foregoing reason, this Court should deny the instant petition in its entirety. For the jurisdictional reasons set forth at 6-8, *supra*, it should deny review on any of the Questions Presented by the Petitioner but should, at most, grant review limited to the Question Presented here by the Respondents.

Respectfully submitted,

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